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No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1947

PRIEBE & SONS, INC., PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 33–40) is reported at 65 F. Supp. 457.

JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1946 (R. 40). A motion for new trial was overruled on October 7, 1946 (R. 40). The petition for a writ of certiorari was filed on January 7, 1947, and was granted on March 10, 1947 (R. 41). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

In 1942 the United States and the petitioner entered into a contract for the sale and delivery of powdered eggs. The contract specified the "delivery date" as May 18, 1942, which was the first day of a ten-day period within which the Government would accept delivery, the particular day within the period being at the Government's option. It was expressly provided that the Government should be entitled to liquidated damages if petitioner should fail to have the eggs inspected and ready for delivery on May 18, 1942. Petitioner failed to have the eggs inspected and ready for delivery on that date. However, the Government, exercising its option under the contract and without knowing of petitioner's breach, did not call for delivery until several days later. At that time petitioner was ready to deliver and promptly did so.

The question presented is whether the provision for liquidated damages, although expressly giving the Government a right to recover in such circumstances, should be denied enforcement on the ground that it constitutes a "penalty".

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent statutory and contractual provisions involved are set forth in the Appendix, pp. 38–42.

STATEMENT

This suit was brought by petitioner in the Court of Claims to recover $14,482.90 under a contract for the sale of dried egg products, entered into between the Federal Surplus Commodities Corporation (FSCC), an agency of the Department of Agriculture under the immediate supervision and control of the Agricultural Marketing Administration (AMA), and petitioner (R. 18). The sum claimed by petitioner was deducted by the Government, as liquidated damages under Paragraph 9 of the contract, from undisputed balances otherwise due (R. 18). The facts found by the Court of Claims are undisputed and may be summarized as follows:

Following the enactment of the Lend-Lease Act of March 11, 1941 (55 Stat. 31), the Department of Agriculture, through the Federal Surplus Commodities Corporation, inaugurated a large-scale program for the purchase of dried egg products to alleviate the food shortages of our European allies (R. 31). Extensive plans were made in cooperation with the industry for the production and purchase by the Government of such products; the entire operation was scheduled on a monthly basis, and had to be correlated with the shipping situation, which was then very tight (R. 31). Petitioner, one of the largest producers, began the production of dried eggs almost as soon

as the Government program was inaugurated; it was fully familiar with the program, the details of the Government operation, and the relationship of the program to the war effort (R. 32).

The contract here involved was entered into pursuant to AMA Announcement FSC–553 of April 14, 1942, Appendix, pp. 38–42 (R. 19–24). This announcement stated that the AMA would consider offers for the sale of dried egg products; and, further, that its "terms and provisions * * * shall become a part" of any offer submitted, and that "upon acceptance by the Federal Surplus Commodities Corporation * * * the offer and acceptance shall constitute a valid and binding contract" (R. 19–20). Detailed provisions of the announcement set forth the quality standards of the finished product; gave instructions for packaging and marking; and made it incumbent upon each vendor to arrange with the AMA for inspection of the product to be delivered (R. 20–22).

By Paragraph 7, the delivery date specified by each vendor in his offer would be the first day of a ten-day period within which the FSCC, at its option, would accept delivery (R. 22).[1] Para-

[1] A single exception, not here relevant, was made in these cases where inspection had been requested by the vendor at least ten days prior to the date specified in the offer and the sampling and inspection services were not forthcoming (R. 22). It was considered that an average of 10 days was required to complete inspection following the manufacture of the eggs. This covered the time required to sample the

graph 7 further provided that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking" the liquidated damages provision of Paragraph 9 (R. 22). The provision permitting the FSCC at its option a ten-day period following the specified contract delivery date was inserted because deliveries had to be scheduled so as to fit into the varying shipping situation. Much of the egg powder was shipped directly to incoming vessels whose arrivals were frequently delayed. Other lots of powder were shipped to packing plants for packaging in containers suitable for consumer use; often these plants were filled to capacity and were unable to absorb any more powder. In addition, powder was shipped to cold storage warehouses as an incident to the packaging program or to await incoming convoys. At times, even these were filled to capacity. The ten-day period allowed the FSCC leeway in its program to meet such contingencies (R. 31–32).

Paragraph 9 contained a graduated scale of damages described as the parties' reasonable forecast of the probable loss that the Government

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finished product, mailing time to the AMA laboratory at Chicago, Illinois, and time required for processing the samples through the laboratory (R. 25). Thus, this exception provides that where sampling had been requested by the vendor in adequate time and inspection had not been completed prior to the delivery date specified, no liquidated damages would be imposed.

would suffer by reason of vendor's failure to deliver the eggs in accordance with the terms of the announcement (R. 23). It stated that "because of the urgent need for the commodity by the purchaser arising from the present emergency conditions", failure of the vendor to deliver the quantities of the commodity or commodities specified in the contract in accordance with the terms of the announcement would "cause serious and substantial damages" to the Government, the amount of which, however, it "will be difficult, if not impossible, to prove"; that the vendor therefore agreed to pay a schedule of liquidated damages ranging from 10 to 30 cents per pound, dependent upon elapsed time between the acceptance date and the contract delivery date (i. e., May 18, 1942); that the sums specified were agreed upon "as liquidated damages and not as a penalty"; and that the parties computed and agreed upon the sums named "as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result" (R. 22–23). Paragraph 9 further provided that the President of FSCC might extend the time for delivery where the failure to make delivery was due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor (R. 23).

On April 22, 1942, petitioner submitted a telegraphic offer to sell, subject to the terms of Announcement FSC–553, a large quantity of dried

egg products for delivery on various dates and at several shipping points (R. 16). Included therein were 90,000 pounds "for delivery on or before May 18 * * * fob Sleepy Eye, Minn." and 110,000 pounds for delivery on or before May 18 "Manning, Iowa" (R. 24). On the following day, AMA telegraphically accepted petitioner's offer, enumerating the various quantities and delivery points, including the 200,000 pounds for "May 18 delivery" (R. 24). Petitioner confirmed the sale contract on April 24, 1942, again referring to the 200,000 pounds for "May 18 delivery" (R. 24). The present action involves 144,829 of the 200,000 pounds of eggs.[2]

Following the general procedure adopted for these and other deliveries, petitioner requested AMA to inspect the lots as the manufacture of the product was completed (R. 25).[3] Pursuant to that request an AMA representative visited petitioner's plant and made test weights and certain checks, such as the date of manufacture of the

[2] The court below found that timely inspection had been made of 54,945 of the total 200,000 pounds, and that shipment thereof had been made before May 18. The shipment of that portion of the dried eggs is not material to this suit (R. 26).

[3] Petitioner has admitted that it was at fault in not having the powder ready for delivery on May 18 (R. 36); the manufacture of the powder here involved was completed between May 9 and May 16, and its inspection completed between May 20 and May 22 (R. 27). Ten days were ordinarily required to complete inspection. See note 1, *supra*, p. 4.

powder and whether the barrels complied with the contract specifications and requirements as to markings; the representative also took samples of the various lots and forwarded them, together with a report of his findings, to the AMA laboratory at Chicago, Illinois (R. 25). The laboratory then analyzed and graded the powder for compliance with the contract specifications and issued a certificate setting forth, among other things, the results of the sampler's investigation and the laboratory analysis, and the contract involved (R. 25). The certificates were dated as of the dates of the completion by the laboratory of its analysis of the lots covered by the various samples (R. 25), which was, for the lots here involved, from May 20 to May 22 (R. 26, 27). Six certificates were issued covering these lots, three being dated May 20, one May 21, and two May 22 (R. 27). Immediately upon such completion, petitioner was notified by wire as to the results of the laboratory analyses and the numbers of the AMA certificates covering the various lots (R. 25).

The FSCC, by written notices dated May 26, May 29, and June 4, 1942, gave petitioner orders to ship "immediately" the various lots comprising the 144,829 pounds (R. 26).* Petitioner shipped

* Since FSCC requested the latter two deliveries after the expiration date of the ten-day period, FSCC would have entertained a claim to reimburse petitioner for such excess costs as it may have incurred for storage beyond that period (R. 32). Petitioner has, however, made no such claim (R. 32).

the lots referred to in the May 26 notice on the same day (R. 26); the lots referred to in the May 29 notice were shipped on June 2 (R. 26); and those referred to in the June 4 notice were shipped on June 5 (R. 26–27).

Subsequently, in accordance with Paragraphs 7 and 9 of Announcement FSC–553, Appendix, pp. 38–42, the United States, by two deductions, deducted from undisputed balances owing to petitioner the sum of $14,482.90 as liquidated damages of 10 cents per pound on these lots which were covered by the AMA inspection certificates, dated May 20, 21, and 22 (R. 27–28, 29). The assessment of liquidated damages was based on the fact that inspection of the product was not completed until after May 18, the first day of the ten-day period within which the Government had option to order delivery, and that, in consequence, the powder was "undelivered in accordance with the terms of this announcement" (Paragraph 9) because of petitioner's "failure to have the specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" (R. 30). Petitioner has nowhere suggested, nor does it now suggest, that the AMA inspection and analyses were not promptly completed, or that AMA in any way caused petitioner's failure to have the product inspected and ready for delivery on May 18 (R. 34).

Petitioner appealed the first deduction to the President of the FSCC. The appeal was denied

after the President first, however, referred the matter to a departmental committee for consideration and advice and, subsequently, upon the renewal of the appeal, to the Solicitor of the Department of Agriculture (R. 29). Both the unanimous committee and the Solicitor recommended against remission of the assessment (R. 29).

Petitioner thereupon brought this suit in the Court of Claims to recover the damages with interest (R. 1–8). That court held that there had been a breach of contract for which the United States was entitled to liquidated damages, and that the provision here involved did not constitute a penalty. Accordingly, it dismissed the petition. (R. 38.)

SUMMARY OF ARGUMENT

As a matter of construction, the contract is unambiguous in providing that a failure by petitioner to have its product inspected and ready for delivery on May 18, 1942, as required by Paragraph 7, would constitute a breach of contract for which the United States would be entitled to liquidated damages under Paragraph 9. This construction was made by the court below, and petitioner does not challenge it here.

Since the contract is to be so construed, no reason exists for not enforcing it according to its terms. Those who entered into it on behalf of the Government were fully authorized by law to include provisions for liquidated damages such as

that here involved; and there are no considerations of policy which would justify judicial excision of the provision from the contract. The provision for liquidated damages was designed to give the Government substantial assurance that contractors would not disrupt the time-table of war shipments by making tardy deliveries. The validity of such a provision is judged as of the time of the making of the contract; and we submit that, judged by the standards of necessity and reasonableness appropriate to the successful execution of a Government food procurement program in time of war, the liquidated damages provision in this contract was entirely reasonable and proper, and should not be denied enforcement.

The provision for liquidated damages is not rendered unenforceable because of any superficial resemblance it may bear to so-called "penalty" clauses in ordinary contracts between private parties. Relying on familiar principles in the law of contracts, petitioner contends that its failure to have its product ready for delivery on May 18, 1942, was at most only a "technical" breach not resulting in damage to the United States, and that a stipulation for liquidated damages for a future breach can not be enforced unless it reflects a reasonable forecast of the damage likely to result from that breach. While it may be doubted whether the general principles upon which petitioner relies can be made the basis for striking

down a provision in a Government contract entered into pursuant to authority granted by Congress, and which has been voluntarily accepted by both parties, we submit that the liquidated damages provision in this case is valid even as judged by the criteria which petitioner urges.

In essence, petitioner would measure the validity of the provision by its reasonableness in relation to the damage sustained by the breach. The circumstances in which this contract was made were such that the Government, and the war effort in which it was then engaged, were unquestionably damaged by contractors' failures to be ready to deliver on the specified contract dates. This contract was only one of a large number of similar agreements providing for the purchase by the Government of dried egg products for shipment to Great Britain and the Soviet Union pursuant to lend-lease. Time was of the essence since deliveries had to be timed to fit into the then critical shipping situation. In making these contracts, the Government was not bargaining for causes of action for liquidated damages. What did concern the Government, and most vitally, was that there should be deliveries on schedule and that goods should be ready for delivery on the dates specified in the contracts so that they could promptly be shipped if a vessel was ready to transport them. Recovery of liquidated damages from contractors, no matter how

large in amount, could not compensate the Government for the irreparable—and indeed unmeasurable—damage to the war effort which would result from a ship's leaving for Europe with its hold partially empty.

If a contractor could risk a "technical" breach in failing to have his goods ready for delivery on the contract date, in the hope that his tardiness would cost him nothing if it should develop that the Government was not ready to accept delivery on that date, it would inevitably increase the number of such failures when the Government did call for the goods. The liquidated damages provision therefore had to be enforced in the cases of failures to be ready to deliver, even where they might not be harmful to the war effort, in order to deter such failures where they might be harmful. This function of the liquidated damages provision, no matter what label be applied to it, was reasonable and justifiable in the circumstances in which contracts of this character were negotiated.

In any event, this Court has repeatedly held that the intention of the parties is controlling in determining whether a disputed provision in a Government contract constitutes "liquidated damages" or a "penalty." Here there is no question as to the intention of the parties; nor is there warrant for judicial refusal to carry out the parties' agreement according to the terms which both voluntarily accepted.

ARGUMENT

THE CONTRACT VOLUNTARILY MADE BY THE PARTIES EXPRESSLY PROVIDED FOR LIQUIDATED DAMAGES FOR FAILURE TO HAVE THE EGGS INSPECTED AND READY FOR DELIVERY ON MAY 18, 1942. PETITIONER COMMITTED SUCH A BREACH, AND NO REASON EXISTS FOR NOT ENFORCING THE CONTRACT ACCORDING TO ITS TERMS

(1) *Construction of the contract.*—A preliminary question should be mentioned, if only to remove it from the area of contention between the parties. There is no dispute as to the proper construction of the contract. The Court of Claims held, and petitioner here accepts such construction (Pet. Br. page 8, footnote), that under Paragraph 7 of the contract, liquidated damages (at the rate specified in Paragraph 9) were to be imposed if the eggs were not inspected and ready for delivery on May 18, 1942, even though petitioner should have them ready when the FSCC requested delivery and should make immediate delivery upon such request.[5]

(2) *Statutory authority for the contract.*—It cannot be doubted that those who entered into the contract on behalf of the United States were fully authorized by law to include provisions for liquidated damages such as that here involved.

[5] Petitioner has abandoned its contention made in the court below, that Paragraph 7 was simply an admonition to have the eggs ready by May 18, 1942, since they might be called for at any time thereafter, and that Paragraph 9 imposed liquidated damages only in the event that there was a failure to deliver the eggs when called for. Judge Jones in his dissent adopted this view (R. 39–40), but it was rejected by the majority of the court below (R. 36–37).

The authority to make the contract derived from two sources: (a) Section 3 (a) of the Lend-Lease Act of 1941, 55 Stat. 31, and (b) Paragraph 3 (r) of the Charter of the Federal Surplus Commodities Corporation, S. Doc. 86, 79th Cong., 1st Sess., p. 395.

(a) Section 3(a) of the Lend-Lease Act of 1941 provided as follows:

> Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—
>
> (1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, *or otherwise procure*, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, *any defense article* for the government of any country whose defense the President deems vital to the defense of the United States.
>
> (2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, * * * [Italics added.]

(b) The Federal Surplus Commodities Corporation, first organized as the Federal Surplus Relief Corporation[6] was a nonprofit membership

[6] The F. S. R. C. was organized under the laws of Delaware, as a nonprofit corporation with no capital stock, on October

corporation incorporated under the laws of the State of Delaware. The broad powers granted it by paragraph 3 of its charter included the following:

* * * * *

(r) To sell, deal in, store, handle, process, transport, deliver, and/or accept delivery of agricultural and/or other commodities and/or products thereof and/or to make contracts for the purchase or sale of the same, by itself or through subsidiaries or other agencies or to act as agent, broker, shipper, consignee, consignor, trustee, or factor with respect thereto and as such agent, broker, shipper, consignee, consignor, trustee, or factor, to buy, sell, deal in, hypothecate, pledge, mortgage, store, handle, process, transport, manufacture, deliver, or accept delivery of the aforesaid commodities and/or products thereof and/or to make contracts for the purchase or sale of the same on behalf of the owner

3, 1933, pursuant to the broad powers granted the President by the N. I. R. A. (Paragraph (b) of Section 2 of Title I and Subsection (a) of Section 201 of Title II), which authorized the President to delegate any of his powers and functions to such agencies as he might designate. On November 16, 1935, the name of the F. S. R. C. was changed to the Federal Surplus Commodities Corporation.

thereof and to fix and collect and deduct all charges for such services.

By the Act of June 28, 1937, 50 Stat. 323, Congress recognized the Corporation as an agency of the Federal Government and extended it as such, under the direction of the Secretary of Agriculture, until June 30, 1939. The Act of February 16, 1938, 52 Stat. 38, authorized the continuation of the Corporation as an agency of the United States until June 30, 1942. Joint Resolution 311 of June 27, 1942, 56 Stat. 461, provided "That the Federal Surplus Commodities Corporation is hereby continued as an agency of the United States, under the direction of the Secretary of Agriculture until June 30, 1945."

Prior to the Act of June 28, 1937, *supra*, the Corporation had acted as an independent agency of the Government not directly responsible to any Department. Subsequent to the enactment of that Act, however, the Corporation, designated an agency under the control of the Secretary of Agriculture, was administered as a regular bureau of that Department.[7] By Section 5 of the Reor-

[7] The Act of April 7, 1934, 48 Stat. 528, authorized the Secretary of Agriculture to make advances to the F. S. R. C. for the purchase of dairy and beef products for relief purposes. The Act of August 24, 1935, 49 Stat. 750, 776, made the

ganization Act of 1939, 54 Stat. 1232, "The Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration of the Department of Agriculture and its functions and the Federal Surplus Commodities Corporation as an agency of the Department of Agriculture and its functions are consolidated into an agency in the Department of Agriculture to be known as the Surplus Marketing Administration. The Surplus Marketing Administration shall be headed by an Administrator, who shall be appointed by and subject to the direction and supervision of the Secretary of Agriculture."[8]

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appropriation authorized by the Act of April 7, 1934, *supra*, available until June 30, 1936. The Act of February 11, 1936, 49 Stat. 1109, 1117–1118, provided that in carrying out Section 32 (2) of the Act of August 24, 1935, *supra*, purchase for donation to the F. S. C. C., during the fiscal years 1936 and 1937 could be made without regard to R. S. 3709. The Act of June 22, 1936, 49 Stat. 1597, 1647–1648, prohibited the F. S. C. C. from incurring any obligations for administrative expenses after June 30, 1937, except pursuant to a specific annual appropriation, and further discontinued its functions as an agency of the United States after that date unless Congress provided otherwise.

[8] In an opinion dated August 8, 1940, the Solicitor of the Department of Agriculture (Op. Sol. 2661), after reviewing the basic legislation under which the reorganization had taken place and the type of reorganization set up thereunder by the President, concluded that the Federal Surplus Commodities Corporation, as an agency of the Government, was not abolished by such consolidation, but that it was made an arm of the Surplus Marketing Administration and that its operations were brought under the immediate administration, supervision, control, and direction of the Administrator of the Surplus Marketing Administration. The

Pursuant to Section 1 of the First War Powers Act of 1941, 55 Stat. 838, the text of which is set forth in the footnote,[9] the President on February 23, 1942, issued Executive Order 9069 (7 F. R. 1409) which provided in part:

> 1. (a) The Surplus Marketing Administration (including the Federal Surplus Commodities Corporation as an agency of the Department of Agriculture), the Agricultural Marketing Service (except the Agricultural Statistics Division), and the Commodity Exchange Administration of the Department of Agriculture and their functions, personnel, property, and records are consolidated into an agency to be known as the Agricultural Marketing Administration of the Department of Agriculture, which agency shall be administered under the direction and supervision of such officer as the Secretary of Agriculture shall designate.
>
> * * * * *
>
> 6. This order shall remain in force during the continuance of the present war and for six months after termination thereof.

Administrator of the Surplus Marketing Administration was the President of the Corporation. Other employees of the Surplus Marketing Administration were officers of the Corporation. The Corporation had no officers who were not employees of the Department of Agriculture. The Corporation had no employees or payroll. Employees of the Surplus Marketing Administration were authorized to function for and in the name of the Federal Surplus Commodities Corporation in the operation of certain programs conducted in the name of the Federal Surplus Commodities Corporation.

[9] "That for the national security and defense, for the successful prosecution of the war, for the support and mainte-

Upon the passage of the Lend-Lease Act of March 11, 1941, the Secretary of Agriculture deemed it advisable to set up a single agency within that Department which would acquire the stocks of agricultural supplies necessary to meet the Department's requirements under the lend-lease program. Since the Federal Surplus Commodities Corporation and its predecessor, the Federal Surplus Relief Corporation, had been making extensive purchases of surplus commodities since 1933, this unit, subsequently designated the Surplus Marketing Administration (see note 6, *supra*), was selected as the agency to perform these functions. 1941 Annual Report, Secretary of Agriculture, pp. 124–125.

(3) *The circumstances in which the contract was made.*—The circumstances in which this contract was made are important because of their

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nance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935."

bearing upon the reasonableness of the liquidated damages provision. This contract was only one of a large number of similar agreements. Shortly after the enactment of the Lend-Lease Act of March 11, 1941, the United States embarked on a program of purchasing dried eggs for shipment to Great Britain and subsequently to the Soviet Union. The shipment of whole eggs had proved impractical both because of their bulk and susceptibility to breakage and spoilage.[10] Accordingly, the Department of Agriculture, in cooperation with the industry, made extensive plans for production and purchase of dried eggs. Commencing in April 1941 and at various times thereafter, the United States, acting through the AMA, published announcements, invited offers, and made contracts for the purchase of dried egg products similar to the contract here involved. Under the Lend-Lease Act definite commitments had been

[10] Report on the First Year of Lend-Lease Operations (Fourth Quarterly Report), p. 22. That report also stated that domestic manufacturers had been encouraged to increase egg drying capacity from 20 million to 225 million pounds per year. *Ibid.* *In the Eighth Quarterly Report to Congress on Lend-Lease Operations* a year later, it was stated (p. 35): "Prior to lend-lease, there were 18 egg-drying plants in the United States with a capacity of 10,000,000 pounds annually; today there are 94 plants with an annual capacity of 315,000,000 pounds and 29 plants under construction which will increase capacity to 400,000,000 pounds. Some 259,000,000 pounds of these dried eggs have already been purchased for lend-lease purposes."

made for the shipment of egg products to Great Britain and the Soviet Union.

The program was affected by the shipping situation and had to be correlated with it. It is a matter of common knowledge that shipping space during the period here involved was at a premium. Ship losses were heavy and it was imperative that no vessel depart with unfilled space because of the failure of a producer to have his product ready by the time specified in his offer. In order to meet its commitments under the lend-lease program, the United States had to have available for shipment all supplies for which it had contracted, as the survival of Great Britain and, to a perhaps lesser degree, of the Soviet Union depended to no small extent upon the ability of the United States to help meet the minimum food requirements of those countries."[11]

[11] "Food has an important place in the lend-lease program. Food is a weapon of war. In its way, it is as essential to winning the war as planes or guns. * * *

"In this war England is again vulnerable on the food front because it must import a large percentage of its food. * * *

"Strict rationing was introduced early in the war which reduced average British consumption of fats, meat, fish and many other foods to two-thirds of the pre-war level. The British people have been limited to a dull diet which affords little choice or variety but which has a minimum nutritive standard high enough in calories to maintain the intensive British war effort. This result has been achieved, in spite of the sharp reduction in quantity and variety, because of lend-lease shipments of dried and concentrated foods from the United States. These bulked small in terms of shipping space, but large in proteins and vitamins. * * * Dried

In short, it was essential that the United States have on hand and ready for shipment supplies of egg products so that it could utilize to the maximum the available shipping space (R. 31).

The dried eggs wherever possible were shipped directly from the producer to the port of shipment and loaded on the vessels. Frequently, expected vessels were delayed in arriving or never arrived and it became necessary to place the dried eggs in cold storage. At times, the dried egg powder was shipped to packing plants for packaging in small containers suitable for consumers' use. Occasionally, cold-storage warehouses and packing plants were loaded to capacity and, notwithstanding the desirability of moving the egg powder at the earliest practicable date, it was necessary to delay the issuance of shipping instructions because of these temporary conditions. To meet this situation, Paragraph 7 provided in effect that shipping instructions could be given on any day within ten days after the contract delivery date.[12] The purpose of this ten days' option period was to give the FSCC some leeway for meeting any critical shipping

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eggs are rationed at a rate equivalent to four eggs per person per month." *Report to the 78th Congress on Lend-Lease Operations, From the Passage of the Act, March 11, 1941, to December 31, 1942* (Ninth Quarterly Report), pp. 42, 46.

[12] The exact language is "a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option." (R. 22.)

and storage conditions that might arise. (R. 31–32.)

The Department of Agriculture had over a year's experience in procuring dried eggs for lend-lease, and petitioner, which had commenced the manufacture of dried eggs in 1941 and did a very large amount of such business with the Government under contracts with FSCC both before and after April 18, 1942, was fully familiar with the program, the details of Government operation, and the relationship of the program to the war effort (R. 32). The parties at the time of entering into the contract agreed upon the necessity of having the egg products delivered on schedule. A complete breakdown in this and correlated lend-lease programs would have caused irreparable damage. Realizing the urgency here involved, the parties fixed certain varying sums per pound as estimated damages for failure to deliver the eggs as set forth in the bid.[13] Presumably petitioner and other bidders took into consideration the costs that would be

[13] Two elements entered into the prospective calculation of damages which ranged from 10 cents where the failure to deliver occurred within 50 days of the acceptance date to 30 cents where the breach occurred between the 246th and 311th day after the acceptance date (R. 23); one represented the estimated damage resulting from the interruption of the Government's scheduled program; and the second the estimated increased cost per pound at which dried eggs could be purchased. The second envisaged a steady increase in the cost of raw eggs and was geared to the elapsed time after the acceptance date.

involved in having their products inspected and ready for delivery by a certain date, and the damages that would follow for late performance, and bid accordingly. *Pacific Hardware Co.* v. *United States,* 49 C. Cls. 327, 334; *American Engineering Co.* v. *United States,* 24 F. Supp. 449, 454 (E. D. Penn.); cf. *Ellicott Machine Co.* v. *United States,* 43 C. Cls. 232, 236.

(4) *The purpose and effect of the liquidated damages provision.*—We shall discuss later (*infra,* pp. 28–36) the question whether enforcement of the liquidated damages provision in the circumstances of this case would, as petitioner urges, do violence to fundamental principles in the law of contracts. Here we pause briefly merely to note our agreement with petitioner's statement (Brief, p. 11), indisputably supported by the authorities, that the validity of such a provision is judged as of the time of the making of the contract. *United States* v. *Bethlehem Steel Co.,* 205 U. S. 105, 120–21; *Wise* v. *United States,* 249 U. S. 361, 365; Williston, Contracts (revised edition) § 777. This case is to be decided, therefore, precisely as it would have been had it arisen in 1942, instead of five years later. And we submit that, judged by the standards of necessity and reasonableness appropriate to the successful execution of a Government food procurement program in time of war, the liquidated damages provision in this contract was entirely reasonable and proper, and should not be denied enforcement.

As has been stated (*supra*, p. 21), the Government's program for the purchase of dried egg products to alleviate the food shortages of our European allies was begun in April 1941. Prior to February 25, 1942, contracts made pursuant to this program contained no provisions for liquidated damages. At that time such provisions were included in the contracts because of the shipping situation, which was then becoming progressively more serious (R. 31). As the Court of Claims found, "The urgency related to time and not to considerations of cost. * * * The underlying and important reason for the [liquidated damages] provision, however, was to assure the receipt of the product at the times specified in the contracts. The clause was inserted to encourage the producers of the dried egg products to have the products available on the dates for which contracted." (*Ibid.*)

Since time was of the essence, the Government obviously was not bargaining for causes of action for liquidated damages. What did concern the Government, and most vitally, was that there should be deliveries on schedule; and that the products should be ready for delivery on the dates specified in the contracts so that they could promptly be shipped if a vessel were available to transport them. Recovery of liquidated damages from contractors, no matter how large in amount, could not compensate the Government for the irreparable—and indeed unmeasurable—

damage to the war effort which would result from a ship's leaving for Europe with its hold partially empty.

We may consider what the practical consequences would have been in 1942 if this Court had upheld petitioner's argument. Petitioner contends that its failure to have its product ready for delivery on May 18, 1942, was at most only a "technical" breach not resulting in damage to the United States, and that the liquidated damages provision should not be enforced since petitioner in fact promptly made delivery upon being notified to do so. But petitioner's argument, if accepted, would frustrate the very purpose of the liquidated damages provision, which was intended to give the Government substantial assurance that contractors would not disrupt the timetable of war shipments by making tardy deliveries. A contractor is obviously much more likely to deliver on time if he knows that he will have to pay liquidated damages if his goods are not ready for delivery on the date specified in the contract. If a contractor could risk a "technical" breach in failing to have his goods ready for delivery on the promised date, in the hope that his tardiness would cost him nothing if it should develop that the Government did not call for delivery on that date, it would inevitably increase the number of such failures when the Government did call for the goods. A contractor who is running behind in his production schedule might well gamble on

being late in having his goods ready for delivery, taking the chance that the Government might not actually be damaged in his particular case, and that he would, therefore, not have to pay liquidated damages. But this is precisely what the liquidated damages provision was intended to prevent; it discouraged contractors from taking this gamble which in some cases, at least, would result in tardy deliveries which would in fact produce irreparable damage to the war effort.

Viewing the situation as it appeared in 1942, therefore, the liquidated damages provision was wholly reasonable as applied to "technical" breaches consisting of failure to be ready to deliver on the promised date. The liquidated damages provision had to be enforced in the case of such failures, even where in the particular circumstances they might not be harmful to the war effort, in order to deter such failures where they might be harmful. We submit that this function of the liquidated damages provision, no matter what label be applied to it, was reasonable in the circumstances in which these contracts were negotiated. And it may also be assumed that Government contractors who voluntarily agreed to such a provision took it into consideration in submitting their bids.

(5) *Validity of the liquidated damages provision, even as measured by principles of contract law which petitioner urges.*—We have already shown that (1) the contract, voluntarily agreed

to by both parties, expressly imposed liquidated damages upon petitioner for failure to have its product inspected and ready for delivery on May 18, 1942; (2) the contract was fully authorized by law; (3) the provision for liquidated damages was entirely reasonable and proper, in light of the circumstances in which the contract was made and was to be carried out; and (4) viewing the situation as it existed during the war when contracts of this character was negotiated, judicial refusal to enforce the liquidated damages provision would frustrate the purpose of the provision in correlating the food procurement program to the then acute shipping situation.

Petitioner argues, nevertheless, that enforcement of the provision would conflict with the fundamental principle in the law of contracts that courts will not enforce penalties. Petitioner contends that its failure to have its product ready for delivery on May 18, 1942 was only a "technical" breach of contract not resulting in damage to the United States, and that a stipulation for liquidated damages for a future breach cannot be enforced unless it reflects a reasonable forecast of the damage likely to result from that breach. It may be noted that petitioner fails to cite any specific rule of federal law which precludes the United States in time of war from entering into a valid enforceable agreement for the sale and delivery of essential war supplies, and which provides that the seller must pay liquidated damages

if he should fail to have supplies ready for delivery on the date specified in the contract. It may well be doubted, therefore, whether the general principle upon which petitioner relies can be made the basis for striking down a provision in a Government contract entered into pursuant to authority granted by Congress, and which has been voluntarily accepted by both parties. But, in any event, we submit that the liquidated damages provision in this case is valid even as judged by the criteria which petitioner urges.

The doctrine which forbids courts to enforce penalties and forfeitures is, as Professor Williston states, "a principle of somewhat vague boundaries". Williston, Contracts (rev. ed.) § 769. While courts have had considerable difficulty in distinguishing between valid provisions for liquidated damages and invalid provisions for penalties, Professor Williston has formulated the essential difference between them as follows (*id.*, § 776):

> A penalty is a sum named, which is disproportionate to the damage which could have been anticipated from breach of the contract, and which is agreed upon in order to enforce performance of the main purpose of the contract by the compulsion of this very disproportion. It is held *in terrorem* over the promisor to deter him from breaking his promise. Liquidated damages, on the other hand, is a sum fixed as an estimate made by the parties at the

> time when the contract is entered into, of the extent of the injury which a breach of the contract will cause. * * *

In essence, petitioner would measure the validity of the liquidated damages provision in this case by its reasonableness in relation to the damage sustained by the Government as a result of petitioner's breach. We have already shown that the Government did suffer damage where contractors failed to be ready to deliver on the specified contract date, even though in some particular cases the contractor might, as here, subsequently be ready to deliver in response to the Government's request. In determining whether the liquidated damages provision, as such, is unenforceable as a penalty, the Court should not limit its inquiry to what happened in this particular case. The matter must be considered from the standpoint of the Government which entered into a whole class of contracts of this type. And, as we have shown above, a failure to be ready to deliver, without more, created so serious a risk of disrupting the delicately adjusted time-table of war shipments, that the Government was in a real sense damaged by every such breach on the part of contractors. That the damage was intangible, and perhaps imponderable in character, did not make it any the less real. The parties themselves recognized this by the express terms of the contract. Paragraph 9 stated that "because of the urgent need for the commodity by the pur-

chaser arising from the present emergency conditions", failure of petitioner to perform its delivery obligations under the contract would "cause serious and substantial damages" to the Government, the amount of which, however, "will be difficult, if not impossible, to prove"; that petitioner therefore agreed to pay a schedule of liquidated damages ranging from 10 to 30 cents per pound, depending upon lapsed time between and the acceptance date and the contract delivery date (i. e., May 18, 1942); that such specified sums were agreed upon "as liquidated damages and not as a penalty"; and that the parties computed and agreed upon the sums named "as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result" (R. 22–23).

We submit, therefore, that judging the contract as of the time it was made, the liquidated damages provision was not unreasonable in relation to the damage which might have been sustained by the Government as a result of petitioner's breach in failing to be ready to deliver on the specified contract date. The principle which restrains courts from enforcing penalties is equitable in origin and character. Williston, *supra*, §§ 774–775. The principle is one, therefore, which cannot be applied with mechanical rigidity. It calls for consideration of all the relevant factors, taken as a whole. In *Clydebank Engineering and*

Shipbuilding Co., Ltd. v. *Castaneda*, [1905] A. C. 6, Lord Robertson observed that all provisions for liquidated damages are penal in the sense of deterring a breach of obligation. "But the clear presence of this element does not in the least degree invalidate the stipulation. The question remains, Had the respondents no interest to protect by that clause, or was that interest palpably incommensurate with the sums agreed on?" *Id.*, at 20. To put that question is, as in the *Clydebank* case, to answer it. The United States unquestionably had an interest in having its contractors ready to deliver on the dates specified in their contracts; and it was, equally unquestionably, damaged by their failure to live up to their obligation.

We submit, moreover, that the decisions of this Court make it clear that, irrespective of the rule in other jurisdictions relating to contracts between private parties, the manifest intention of the parties is controlling in determining whether a disputed provision in a Government contract constitutes "liquidated damages" or a "penalty". In *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, at 119, the Court said:

> The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved

> could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association* v. *Moore,* 183 U. S. 642, 669, where a large number of authorities upon this subject are referred to. The principle decided in that case is much like the contention of the Government herein. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out. * * *

And in *Wise* v. *United States,* 249 U. S. 361, 365–366, the Court reaffirmed and elaborated upon the basis of its earlier holding in the *Bethlehem* case:

> The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Association* v. *Moore,* 183 U. S. 642, applied in *United States* v. *Bethlehem Steel Co.,* 205 U. S. 105, and the result of the modern decisions was determined to be that in such cases courts

will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

There are, no doubt, decided cases which tend to support the contention advanced by appellant, but these decisions were, for the most part, rendered at a time when courts were disposed to look upon such provisions in contracts with disfavor and to construe them strictly, if not astutely, in order that damages, even though termed liquidated,

> might be treated as penalties, so that only such loss as could be definitely proved could be recovered. The later rule, however, is to look with candor, if not with favor, upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts and because adjusting in advance, and amicably, matters the settlement of which through courts would often involve difficulty, uncertainty, delay and expense. * * *

It is submitted, therefore, that, unless a liquidated damages stipulation in a Government contract is fraudulent, oppressive, unconscionable, or for any other reason inequitable for a court to enforce, the decisions of this Court uphold the view expressed by Sir George Jessel in *Wallis* v. *Smith*, 21 Ch. D. 243, 266, that courts "should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves." Here there is no question as to the intention of the parties; nor is there any justification for judicial refusal to carry out the parties' agreement according to the terms which both voluntarily accepted. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, 190; *Robinson* v. *United States*, 261 U. S. 486; *United States* v. *Walkof*, 144 F. 2d 75 (C. C. A. 2).

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1947.

APPENDIX

(1) Section 3 (a) of the Lend-Lease Act of 1941, 55 Stat. 31, provided as follows:

> Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—
>
> (1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, *or otherwise procure*, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, *any defense article* for the government of any country whose defense the President deems vital to the defense of the United States.
>
> (2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, * * * [Italics added.]

(2) Announcement FSC–553 (R. 19–24), which, by its terms, became a valid and binding contract between petitioner and the Federal Surplus Commodities Corporation upon the acceptance of petitioner's offer, provided in pertinent part:

ANNOUNCEMENT FSC–553

Purchase of Dried Egg Products

(Supersedes Announcement FSC–450)

The Agricultural Marketing Administration announces that it will receive and consider offers for the sale of the following dried egg products, which may for convenience be referred to by their identifying letters:

Product A. Spray dried whole egg.

* * * * *

Offers submitted pursuant to this announcement will be accepted by, and after acceptance will become contracts with, the Federal Surplus Commodities Corporation.

* * * * *

Terms and Conditions

In submitting an offer of sale, the following terms and provisions of this announcement shall become a part of the offer to sell, and upon acceptance by the Federal Surplus Commodities Corporation, hereinafter referred to as FSCC, the offer and acceptance shall constitute a valid and binding contract.

* * * * *

PAR. 7. *Delivery.*—The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below. The only exception against invoking the provisions of Paragraph 9 shall be when sampling and inspection by the Agricul-

tural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f. o. b. railroad cars, or, at the option of the FSCC, f. o. b. truck or local warehouse specified by the FSCC.

* * * * *

PAR. 9. *Delays—Damages: Payment.*—Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each

pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted delivery date (date specified in offer):	Liquidated damage sum
Within and including 50 days of acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	.15
116 to 180 days from acceptance date, inclusive	.20
181 to 245 days from acceptance date, inclusive	.25
246 to 311 days from acceptance date, inclusive	.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoice will be made as soon as practicable after submission of a correct

claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

PAR. 10. *Contract of sale.*—This announcement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

No. 16.—October Term, 1947.

Priebe & Sons, Inc., Petitioner, v. The United States. } On Writ of Certiorari to the Court of Claims.

[November 17, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to the Court of Claims, presents the question whether a provision in a government contract for "liquidated damages," as construed and applied, should be denied enforcement on the ground that it constitutes a "penalty."

Shortly after the enactment of the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. V, § 411 et seq., the United States acting through agencies of the Department of Agriculture embarked on a program of purchasing dried eggs for shipment to England and Russia. Petitioner agreed to furnish a quantity of dried eggs under that program to the Federal Surplus Commodities Corporation (FSCC). The contract called for "May 18 [1942] delivery" which date, according to the contract, "shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option." Petitioner was also required to have the eggs inspected, delivery to be accompanied by inspection and weight certificates.

The contract contained two provisions respecting "liquidated damages." One, contained in paragraph 9, was applicable to delays in delivery.[1] It has no application

[1] That provision of the contract provided:

"Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need

here, for as we shall see, deliveries were timely. The provision for "liquidated damages" with which we are concerned is contained in paragraph 7 and is applicable to a totally different situation. It provides, with exceptions not material here, that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" will be cause for payment of "liquidated damages."[2]

On May 18, 1942, petitioner had not made delivery nor had the eggs been inspected. Inspection was, however, completed and certificates issued by May 22, which was prior to the time when FSCC asked for delivery. For it was not until May 26 that FSCC gave the first of several written notices for the shipment of eggs involved in this litigation. Petitioner made timely shipments pursuant to those instructions. Subsequently FSCC ascertained that petitioner's inspection certificates had been issued after May 18 and accordingly deducted from the price 10 cents per pound on the theory that the failure to have the eggs inspected and ready for delivery by May 18 was a default which put into operation the "liquidated damages" provision of the contract.

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for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement. * * * The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result."

The "liquidated damages" ranged from 10 to 30 cents per pound dependent upon the elapsed time between the acceptance date and May 18, 1942.

[3] The measure of "liquidated damages" in this situation was the same as that for delays in delivery set forth in note 1, *supra*.

Petitioner brought this suit in the Court of Claims to recover the amounts withheld plus interest. The Court of Claims, being of the view that there had been a breach of contract for which the United States was entitled to "liquidated damages," dismissed the petition. 65 F. Supp. 457.

We construe the contract to mean that the time for delivery by petitioner was not May 18, 1942 but the time or times chosen by the FSCC within the ten-day period which began on May 18. That is to say, performance by petitioner was not due until request was made and instructions given for delivery. That interpretation is in accord with the uncontested finding of the Court of Claims that petitioner promised delivery "within a ten-day period commencing May 18, the precise date to be selected" by the FSCC.

The contract was drawn, however, to make the "liquidated damages" provisions include so-called defaults of petitioner which antedated the time when delivery was due but which in no way interfered with or caused delay in that performance. As noted, "liquidated damages" became payable on "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer," viz. by May 18, 1942. The Court of Claims held this provision enforceable even though petitioner had made prompt delivery of the eggs, because it felt that the provision enabled respondent to carry on its dried-egg program "with assurance that it could count on the dried-egg products being ready on the specified date." That position is amplified by respondent. The argument in short is that liability to pay "liquidated damages" for failure to have goods ready for delivery even prior to the time when delivery is due gives assurance against tardy deliveries; that a prompt timetable of shipments was important here because of war conditions and the necessity of having goods ready for loading whenever shipping space was available; that

delay in deliveries would cause unmeasurable damage; and that even though no damage were apparent in a particular case, the "liquidated damages" provision should be enforced as a deterrent of tardy deliveries in the whole class of contracts relating to this procurement program.

It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law. *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111, and cases cited. That has been done in other cases where the Court has considered the enforceability of "liquidated damages" provisions in government contracts. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 120–121; *Wise* v. *United States*, 249 U. S. 361, 365–366. We adhere to those decisions and follow the same course here.

Today the law does not look with disfavor upon "liquidated damages" provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. *Wise* v. *United States*, *supra*, p. 365; *Sun Printing & Pub. Assn.* v. *Moore*, 183 U. S. 642, 672–674; Restatement, Contracts § 339; *Dunlop Pneumatic Tyre Co.* v. *New Garage & M. Co.* [1915] A. C. 79. And see *Kothe* v. *Taylor Trust*, 280 U. S. 224, 226. They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. *United States* v. *Bethlehem Steel Co.*, *supra*, p. 121; *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda* [1905] A. C. 6, 11–13, 20; *United States* v. *Walkof*, 144 F. 2d 75, 77. And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract. *United States* v. *Behlehem Steel Co.*, *supra*, p. 121.

Judged by these standards, the provision in question may not be sustained as an agreement for "liquidated

damages." It does not cover delays in deliveries.[3] It can apply only where there was prompt performance when delivery was requested but where prompt delivery could not have been made, due to the absence of the certificates, had the request come on the first day when delivery could have been asked. A different situation might be presented had the contract provided for notice to the Government when the certificates were ready. Then we might possibly infer that promptness in obtaining them served an important function in the preparation of timetables for overseas shipments. But the contract contains no such provision; and it is shown that FSCC had no knowledge that the certificates were not ready on May 18 until long after deliveries had been made. So, it is apparent that the certificates were only an essential of proper delivery under this contract.

It likewise is apparent that the only thing which could possibly injure the government would be failure to get prompt performance when delivery was due. We have no doubt of the validity of the provision for "liquidated damages" when applied under those circumstances. *United States* v. *Bethlehem Steel Co., supra; Wise* v. *United States, supra.* And see *Maryland Dredging Co.* v. *United States,* 241 U. S. 184; *Robinson* v. *United States,* 261 U. S. 486. But under this procurement program delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. Under these circumstances this provision for "liquidated damages" could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an

[3] They are covered, as we have already noted, by the provision set forth in note 1, *supra.*

in terrorem effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements. See *Kothe* v. *Taylor Trust*, *supra*; Restatement, Contracts § 339. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust. See Salmond & Williams on Contracts (2d ed. 1945) § 202.

It is said, however, that a different rule should obtain here because of the broad procurement powers involved under the Lend-Lease Act. We are pointed, however, to no provision by which the Congress authorized the imposition of penalties as sanctions to that program; nor do we find any. We cannot infer such a power. The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of Congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. The rule which they announce has been applied both to the exigencies of war (*United States* v. *Bethlehem Steel Co.*, *supra*) and of peace (*Wise* v. *United States*, *supra*). The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the Congressional purpose should be plain before we take the step.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 16.—October Term, 1947.

Priebe & Sons, Inc., Petitioner, v. The United States.	On Writ of Certiorari to the Court of Claims.

[November 17, 1947.]

Mr. Justice Black, with whom Mr. Justice Murphy agrees, dissenting.

The Court today invokes elusive and uncertain principles of "general contract law" to strike down a clause in a Government contract executed under the recognized congressional authority of the Lend-Lease Act. Without reliance upon any indication of congressional policy, the Court assumes that it can discover somewhere a "general contract law," and that it is empowered to apply this law to wartime contracts of the Federal Government. I regard the decisions of this Court since *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as having established that the construction and validity of *all* Government contracts are governed by federal law, whether executed under authority of the Lend-Lease Act or any other. *Metropolitan Bank* v. *United States*, 323 U. S. 454, 456; *see United States* v. *Allegheny County*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. And Congress has enacted many laws, both general and specific in nature, to guide all contracting agents of the Federal Government, 41 U. S. C. §§ 1 *et seq.*, as well as many detailed rules applicable solely to certain categories of contracts. *See, e. g.*, Merchant Marine Act of 1936, 49 Stat. 1985, tits. 5, 7, 8. But I can find no act of Congress which expressly or impliedly prohibits such generally authorized agents from making a contract containing a liquidated damage provision such as here involved. Nor has Congress ever intimated that contracts within the general powers of Government agents should be in-

validated by this Court's invocation of a nebulous "general contract law," or because such contracts failed to harmonize with this Court's views of what is "fair and reasonable." I had not supposed that the federal courts were vested with such supervisory and revisory powers over the terms of contracts voluntarily and advisedly entered into by business groups with congressionally authorized Government agents.

The available indications of congressional policy point to the very opposite conclusion. Far from indicating a hostility to liquidated damage clauses, Congress has made it mandatory that such clauses to protect against delay in performance be inserted in all Government building contracts; and it has provided that such clauses "shall be conclusive and binding upon all parties" without the necessity for the Government to prove "actual or specific damages sustained . . . by reason of delays." 32 Stat. 326; 40 U. S. C. § 269. Surely this provision would not permit federal judges to ignore liquidated damage clauses in building contracts because actual damages were not proved and could not have been reasonably forecast. And in no other act of Congress is there a suggestion that liquidated damage provisions in other Government contracts are unenforceable because the courts believe no actual damages could be sustained from a breach. Yet the majority adopts such a principle today to invalidate a clause in this contract, and thereby, as I see it, embarks upon the very undesirable practice of supervising and revising the congressionally authorized conduct of federal contracting agents. This Court has previously refused to initiate such a practice in a case where the Government on most appealing grounds urged us to revise its agent's contract. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 308–309.

In this case procurement officers of the Federal Government, admittedly acting within their authority, adver-

tised for bids for the sale of dried eggs which the advertisement provided were to be ready for delivery to the Government on a date to be chosen by the bidder. Actual delivery of the eggs was to be made on the Government's demand any time within a ten-day period following the ready date named by the bidder. The advertisement also contained a provision for the assessment of liquidated damages for delay in delivering the eggs or in having them inspected, certified, and ready for delivery by the bidder's chosen date.

The efficient integration of a large scale procurement program, such as was here involved, made it highly advisable for the Government to exact assurances that goods would be ready for delivery in advance of selection of the date for actual delivery. Essential to the program was the coordinated movement of boxcars and ships, both of which were then scarce and in great demand. Each day's idleness of cars and ships might mean injuries to the Government of large but uncertain amounts. Under such circumstances it would have been a serious omission for Government agents to fail to check and double check, contract and double contract, in order to have goods ready for delivery to cars and ships with the least possible lost time in the use of transport facilities. And the Government had a right to depend on its contractors living up to their promise to have goods ready on the date they said they would so that the Government might thereafter select a delivery date with certainty that no transportation delays would occur. Failure to do so might well disrupt the Government's prearranged train and ship schedules, causing it cumulative difficulties not easily translated into money damages. And all of these damages might result from failure to have the goods ready as promised, even though the contractor might later be able to deliver when called for and thus escape the delivery liquidated damage provision.

This contract was made at arms' length. The petitioner knew of the necessity for faithful performance of its obligations. It undoubtedly gave consideration to this fact and fixed its price high enough to satisfy itself of its profits. I can think of no persuasive reason why it should now be relieved of the obligation it advisedly assumed which was, in effect, to charge less for its goods if they were not ready for delivery on the date it promised. I do not deny that this Court can fill gaps in statutes so as to execute broad congressional purposes and that courts generally have made large contributions to laws governing contracts. But I think that the Court here makes a law which frustrates congressional purposes and tends most unwisely to handicap Government purchasing agents in the performance of their authorized duties. I adhere to the belief that it is unwise for the courts to interfere with the making of contracts by Government agents in harmony with valid congressional authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128, 131–132. I would affirm this judgment.

SUPREME COURT OF THE UNITED STATES

No. 16.—October Term, 1947.

Priebe & Sons, Inc., Petitioner, v. The United States.	On Writ of Certiorari to the Court of Claims.

[November 17, 1947.]

Mr. Justice Frankfurter, whom the Chief Justice joins, dissenting.

Upon failure to perform the undertaking of a contract the law secures the money equivalent for the loss thereby incurred. In order to avoid the waste of controversy as to the extent of a loss, should it occur, and to save judges and juries from having to guess about it, parties naturally enough, often stipulate in advance the compensation for such loss, and courts in appropriate situations will enforce such a provision for liquidated damages. But exactions for a breach of contract not giving rise to damages and merely serving as added pressure to carry out punctiliously the terms of a contract, are not enforced by courts. In familiar language, penal provisions in a contract—those that concern defaults that bring no loss in their train—are not enforceable. I assume that the basic reason for this doctrine is that the infliction of punishment through courts is a function of society and should not inure to the benefit of individuals. So-called *qui tam* actions, suits for treble damages and the like, stand on a different footing. In such situations society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation. The essence of the law's remedy for breach of contract is that he who has suffered from a breach should be duly compensated for the loss incurred by non-performance. But one man's default should not lead to another man's unjust enrichment.

If the contract in controversy is to be treated as an ordinary commercial transaction, to be governed by the ordinary rules applicable also to Government contracts in ordinary times, I could not escape the conclusion that the provision for "damages" merely for failure to secure inspection certificates without failure of delivery operates as a penalty to deter non-observance of this requirement. It is not a determination in advance of the money lost to the Government due to default. The Government wanted delivery of eggs. But failure of delivery or inability to deliver for want of certificates brings into operation the provisions for liquidated damages of paragraph 9. There is no money loss to the Government through failure of any of the intervening preparatory steps in the process leading to delivery. Of course a contractor is interested in having the steps leading to performance duly carried out. Exactions for any of the intervening steps would undoubtedly have a coercive influence in securing performance of that which is the real object of a contract. But if a contract is performed, the promisee has suffered no loss even though some intervening step by the promisor has been delayed. And so, such a provision for default of an intervening step, when due delivery has been made, is plainly exaction of an amount for which the promisee has not been out of pocket. Accordingly, if this contract were an ordinary commercial contract subject to the ordinary rules of the law of contract, I should have to find against the Government.

But this is not an ordinary peace-time Government contract. The Government may certainly assure performance of contracts upon which the effective conduct of the war depended by tightening the consequence of non-performance of each stage in the ultimate process of delivery of essential goods to the extent of having a tariff of deductions for non-performance of each step in the ultimate goal of the contract. Congress certainly could spe-

cifically authorize such pressures on each step in the sequence of a contract-performance by provisions like that of paragraph 7. Congress did not do this. Instead of particularizing to that extent, such a provision would, as a matter of fair construction, also be authorized by Congress if it empowered an agency to procure "under appropriate terms and conditions" essential war goods. I could not hold that an authority by Congress to a procurement agency to make contracts for carrying out the food program for the successful conduct of the war could not appropriately require of those who voluntarily enter into such contracts with the Government to incur a reasonable penalty for default for necessary certificates upon which delivery depended. And this would be so even though for reasons themselves relating to the war effort, the Government reserved a necessary margin of time within which to call for delivery and by a delayed call obtained delivery when required, though if the call had been previously made the failure of certification might have been serious. Congress did not add to its authorization for entering into the making of these war contracts the assumed provision "with appropriate terms and conditions." But I find the distinction between what Congress did and the indicated addition too thin for denying to the contracting officers of the Government the implied right, under the circumstances of the times. Congress authorized the President, through appropriate delegation, to "procure . . . any defense article" deemed "vital to the defense of the United States." Section 3 (a) of the Lend-Lease Act of 1941. 55 Stat. 31. And so I conclude that the provisions of paragraph 7 were, on a fair reading of Congressional legislation, within the contracting powers of the President as much so as if Congress had in terms authorized such a provision.

It hardly needs to be added that neither formal logic nor practical judgment requires that authority to impose

safeguards for preventing breaches short of ultimate default, similar to those contained in paragraph 7 of this contract for vital war products, be inferred from the ordinary-implied powers of Government contracting officers in making ordinary contracts for the Government.

If one starts with the assumption that, in the absence of specific Congressional authority, a fixed rule of law precludes contracting officers from providing in a Government contract terms reasonably calculated to assure its performance even though there be no money loss through a particular default, there is no problem. But answers are not obtained by putting the wrong question and thereby begging the real one. It is misleading to ask: "What remedies has Congress provided for breaches of contract?" The answer to that depends on the answer to the true question: "With what scope has Congress presumably invested the Executive in order to carry out the duty, not defined with particularity, of assuring the necessary war supplies?"

The enforceability of a clause like that now in controversy, regardless of whether it is fairly to be regarded as one for "liquidated damages" or for a "penalty," is a matter of appropriate implications drawn from a total absence of expressed Congressional desire. Such implications do not rest on dogma. They derive from the considerations of policy underlying them. It is one thing to attribute to Congress the desire to confine the Government's remedies for breaches of its ordinary procurement contracts to the rules of law governing ordinary commercial contracts. It is quite another thing to infer that when in March, 1941, Congress gave the President, through the Lend-Lease Act, unrestricted power to "procure" essential war materials, it meant to fetter the procurement agencies selected by the President, by forbidding them to include, among the terms of bids to be voluntarily accepted, conditions reasonably calculated to secure performance.

While Congress presumably wishes the ordinary rules of contract law to apply in ordinary times, the Lend-Lease Act was the most potent proof that the times were far from ordinary. The inclusion of paragraph 7 in contracts such as this was an appropriate regard by the Executive for the very emergency which impelled Congress to act and to give its agencies power to act.